U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JAN 2 4 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development business. It seeks to employ the beneficiary permanently in the United States as an Engineer II pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to establish that the beneficiary met the job qualifications stated on the alien employment certification. Specifically, the director determined that the petitioner has failed to show that the beneficiary meets the educational requirements listed on the ETA Form 9089 as of the priority date and denied the petition accordingly.

On appeal, counsel submits a brief and duplicate copies of the Request for Evidence (RFE); the petitioner's response to the RFE; an evaluation dated 2010; the beneficiary's diploma, provisional certificate, university transcripts, and experience certificate from Infosys Technologies Limited; the director's decision; and a copy of the ETA Form 9089.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary possesses a Bachelor of Technology degree in Mechanical Engineering from the [redacted] in November 2003 and five years and eleven months of relevant experience. The issue in this case is whether the beneficiary's Bachelor's degree and experience meets the minimum requirements set forth on the labor certification.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the

> domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien employment certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien employment certification.

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's.
H.4-B. Major field of study: Computer Science.
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: Accepted.
H.8-A. Alternate level of education: Bachelor's.
H.8-C. Number of years experience: Five.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Experience in and/or knowledge of Advance C, VB, C++, Unix, MS Access, Oracle, Livelink Development in Builder and LAPI, Core Java, Livelink Administration, HTML, Javascript, J2EE, 3-Tier Architecture, IPlanet, IIS, Apache, Tomcat, DB2, DOS, Shell Scripting, Perl, and Sybase. **Employer will accept any combination of education, training and experience as indicated above that is equivalent to a Master's degree in computer science as determined by a credential evaluator including a bachelor's degree plus five years progressive, post-baccalaureate experience in the specialty.**

Part J of the labor certification states that the beneficiary's highest level of education related to the offered position is a Bachelor's degree in Mechanical Engineering from the [redacted] completed in 2003.

The labor certification and regulation cited above requires that an applicant for the position of computer software engineer, applications, have a master's degree. The designated field of study on the ETA Form 9089 is computer science. Mechanical Engineering is not listed as an alternate field of study. The petitioner checked "no" to question 7, part H, which asks if an alternate field of study was acceptable.

The director stated in his decision that the beneficiary holds a foreign Bachelor of Technology degree in Mechanical Engineering conferred by the [redacted] in November 2003.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php. Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National

Council on the Evaluation of Foreign Educational Credentials.[1] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[2]

According to EDGE, a four-year Bachelor of Engineering/Technology degree from India is comparable to a bachelor's degree in the United States. Therefore, the petitioner has established that the beneficiary has a foreign equivalent degree of a U.S. baccalaureate degree in Mechanical Engineering.

In this case, while it may be viewed that the beneficiary holds at least the foreign degree equivalent of a bachelor's degree in Mechanical Engineering, his studies at the do not indicate that he has ever received a master's degree or bachelor's degree in computer science.

The record contains an evaluation of the beneficiary's educational credentials prepared by for on May 17, 2010. The evaluation states that the beneficiary "has satisfied requirements substantially similar to those required toward the completion of a four-year Bachelor's Degree program in Engineering from an accredited institution of higher education in the United States." The evaluation concludes that the beneficiary has attained the equivalent of a Bachelor's degree in Engineering from an accredited institution of higher education in the United States. The evaluation does not conclude that the beneficiary has a master's degree or bachelor's degree in computer science.

The record also contains an evaluation of the beneficiary's educational credentials prepared by for on November 26, 2010. The evaluation concludes that, based on his education and experience, the beneficiary "has attained the equivalent of a

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[1] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

[2] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

Master's Degree in Computer Science from an accredited institution of higher education in the United States."

For the second preference immigrant visa classification, USCIS may not consider academic equivalency evaluations based on both academic credentials and work experience. In the January 20, 2012 Request For Evidence (RFE), the director informed the petitioner that an acceptable evaluation should "consider formal education only, and not practical training or experience." No additional evaluations were submitted in response to the RFE or on appeal.

Based on the above, the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act.

On appeal, counsel asserts that the petitioner "did not indicate anywhere on the ETA Form 9089 that the Bachelor's degree must only be in computer science." Counsel argues that the alternate combination of education and experience in the ETA Form 9089 should be construed to permit a bachelor's degree in any field – including mechanical engineering -- so long as the applicant also has five years of progressive experience in the specialty sufficient to be evaluated as "equivalent" to a master's degree in computer science as determined by a credential evaluator. Counsel points to language in Section H.14 of the Form 9089 which states, "Employer will accept any combination of education, training and experience as indicated above that is equivalent to a Master's degree in Computer Science as determined by a credential evaluator including a bachelor's degree plus five years of progressive, post-baccalaureate experience in the specialty." Counsel also sites a recent decision of the Board of Alien Labor Certification Appeals (BALCA). Counsel's arguments are not persuasive.

As noted above, USCIS is bound by the plain language of the ETA Form 9089 exactly as it was completed by the employer. *See Rosedale Linden Park Company*, 595 F.Supp. at 833-834. As the petitioner checked "no" to the question whether an alternative field of study was acceptable, it cannot be concluded that the petitioner reasonably intended the ETA Form 9089 to permit a bachelor's degree in any field plus five years of education experience as an alternate combination of education and experience. Furthermore, USCIS may not add terms to the labor certification. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). As the ETA Form 9089 is silent as to any combination of a bachelor's degree in any field with five years of experience working in computer science that could clarify or supersede the petitioner's unambiguous prohibition of any degrees in alternate fields of study, USCIS may not now include this alternate requirement. The language in Section H.14 is required by the DOL regulations and does not alter the plain language of the Form 9089 or give relevant insight into the petitioner's intent with respect to the minimum requirements. *See* 20 C.F.R. § 656.17(h)(4)(ii). Further, counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the adminsitration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The beneficiary does not have a Master's or Bachelor's degree in computer science and, thus, does not meet the educational requirements stated on the labor certification. For this reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.